Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities	))))	MM Docket No. 97-182

REPLY COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS CONSISTING OF:

U.S. Conference of Mayors, Michigan Townships Association, National Association of Counties, Texas Coalition of Cities on Franchised Utilities Issues

AZ: Town of Paradise Valley, Pinal County

CA: City of Belmont

CO: City and County of Denver, City of Lakewood, Greater Metro Telecommunications Consortium consisting of 24 other Colorado local governments

FL: City of Coconut Creek, City of Deerfield Beach, City of Fort Lauderdale

IL: City of Breese, City of Naperville, City of Rockford, City of St. Charles, Village of Western Springs, Village of Lisle, and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities

KY: Municipal Government League of Northern Kentucky, Inc. consisting of 32 municipalities

MI: City of Detroit, City of Grand Rapids, and 26 other Michigan municipalities

MN: City of Albert Lea, City of Arden Hills, City of Crookston, City of Edina, City of Fridley, City of Lilydale, City of North Oaks, City of Plymouth

MO: City of Gladstone, City of Springfield

NC: Piedmont Triad Council of Governments consisting of 24 North Carolina local governments and Town of Chapel Hill

NJ: Bridgewater Township

NV: City of Las Vegas, City of Sparks

OH: City of Canton, City of Eastlake

TX: City of Dallas, City of Fort Worth, and 19 other Texas municipalities

UT: City of Provo

John W. Pestle
Patrick A. Miles, Jr.
Dale R. Rietberg
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
333 Bridge Street, N.W.
Grand Rapids, MI 49504
Their Attorneys

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TABLE OF CONTENTS

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I. INTRODUCTION AND SUMMARY

A. Introduction: Concerned Communities and Organizations ("CCO")[1], by their

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[1]The Concerned Communities and Organizations consist of the following local governments and organizations:

U.S. Conference of Mayors is a nonprofit national organization representing mayors of cities with populations over 30,000. Its membership includes more than 1,400 cities and 49 state-municipal organizations. **Michigan Townships Association** is a nonprofit corporation which provides education, exchange of information and guidance to and among township officials and its current membership consists of 1,242 Michigan Townships. **National Association of Counties** is the only national organization representing county government in the United States. **Texas Coalition of Cities on Franchised Utilities Issues** (TCCFUI) consists of 90 member municipalities.

Arizona: Town of Paradise Valley, Pinal County
California: City of Belmont
Colorado: City and County of Denver, City of Lakewood, and Greater Metro Telecommunications Consortium consisting of Adams County, City of Arvada, City of Aurora, City of Brighton, City of Castle Rock, City of Cherry Hills Village, City of Commerce City, Douglas County, City of Englewood, City of Edgewater, City of Glendale, City of Golden, City of Greenwood Village, City of Lafayette, City of Lakewood, City of Littleton, City of Northglenn, City of Parker, City of Sheridan, Town of Superior, City of Thornton, City of Westminster, City of Wheat Ridge
Florida: City of Coconut Creek, City of Deerfield Beach, City of Fort Lauderdale
Kentucky: Municipal Government League of Northern Kentucky, Inc. consisting of the municipalities of Alexandria, Bellevue, Bromley, Carrollton, Cold Spring, Covington, Crescent Park, Crescent Springs, Crestview, Crestview Hills, Dayton, Dry Ridge, Edgewood, Elsmere, Erlanger, Florence, Ft. Mitchell, Ft. Thomas, Ft.

	Wright, Highland Heights, Independence, Lakeside Park, Ludlow, Melbourne, Newport, Park Hills, Southgate, Taylor Mill, Villa Hills, Walton, Wilder, Williamston
Illinois:	City of Breese, City of Naperville, City of Rockford, City of St. Charles, Village of Lisle, Village of Western Springs and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities
Michigan:	City of Detroit, City of Grand Rapids, Ada Township, Bloomfield Township, Byron Township, Canton Charter Township, City of Birmingham, City of Cadillac, City of Eaton Rapids, City of Huntington Woods, City of Kentwood, City of Livonia, City of Marquette, City of Rockford, City of Walker, City of Wyoming, Elk Rapids Township, Frenchtown Charter Township, Gaines Charter Township, Grand Haven Charter Township, Grand Rapids Charter Township, Handy Township, Harrison Charter Township, Robinson Township, Scio Township, City of Westland, Yankee Springs Township, Zeeland Charter Township
Minnesota:	City of Albert Lea, City of Arden Hills, City of Crookston, City of Edina, City of Fridley, City of Lilydale, City of North Oaks, City of Plymouth
Missouri:	City of Gladstone, City of Springfield
New Jersey:	Bridgewater Township
Nevada:	City of Las Vegas, City of Sparks
North Carolina:	Piedmont Triad Council of Governments consisting of Alamance County, City of Archdale, City of Asheboro, City of Burlington, Caswell County, Town of Chapel Hill, Davidson County, City of Eden, Town of Elon College, Town of Gibsonville, City of Graham, Guilford County, Town of Haw River, City of High Point, Town of Jamestown, City of Lexington, Town of Liberty, Town of Madison, Town of Mayodan, City of Mebane, City of Randleman, Randolph County, Town of Ramseur, City of Reidsville, Rockingham County, and Town of Yanceyville
Ohio:	City of Canton, City of Eastlake
Texas:	City of Dallas, City of Grand Prairie, City of Amarillo, City of Arlington, City of Cedar Hill, City of Coppell, City of DeSoto, City of Fort Worth, City of Haltom City, City of Hurst, City of Irving, City of Kaufman, City of Keller, City of Kennedale, City of Lancaster, City of Laredo, City of Longview, City of Plano, City of University Park, City of Waxahachie, Town of Addison, and TCCFUI (consisting of the Cities of Abernathy, Alamo, Andrews, Arlington, Balcones Heights, Belton, Big Springs, Bowie, Breckenridge, Brenham, Brookside Village, Brownfield, Brownwood, Buffalo, Bunker Hill Village, Burkburnett, Canyon, Carrollton, Center, Cisco, Clear Lake Shores, Cleburne, College Station, Conroe, Corpus Christi, Cottonwood Shores, Crockett, Dallas, Denison, Dickenson, El Lago, Electra, Fredericksburg, Friendswood, Fort Worth, Georgetown, Grand Prairie, Grapevine, Greenville, Gregory, Groves, Harlingen, Henrietta, Hewitt, Irving, Jamaica Beach, Jacinta City, Kilgore, La Grange, Lampasas, League City, Leon Valley, Levelland, Lewisville, Longview, Los Fresnos, McAllen, Mexia, Missouri City, Navasota, Nolanville, Paris, Pearsall, Plainview, Plano, Ralls, Refugio, Reno, Richardson, River Oaks, Rosenberg, San Marcos, San Saba, Seminole, Seymour, Smithville, Snyder, South Padre Isle, Spearman, Stephenville, Sugar Land, Taylor Lake Village,

attorneys, hereby file reply comments in the above-captioned proceeding pursuant to the Notice of Proposed Rulemaking, FCC 97-296 (released August 19, 1997) ("NPR").

For the additional reasons stated herein, CCO continues to oppose the Petition for Further Notice of Proposed Rulemaking ("Petition") filed jointly by the National Association of Broadcasters and the Association for Maximum Service Television (collectively, "NAB" or "Petitioners") which led to the NPR and proposed rule. This proceeding should be terminated without the adoption of any new rule or policy by this Commission.

B. Summary: CCO supports the findings made by various state and municipal commenters in this proceeding. In addition, CCO submits that the findings of certain of the broadcasters should be disregarded, and this proceeding terminated, because those filings contain material misrepresentations of fact and violate the obligation of complete truthfulness and candor required of applicants. CCO requests that State and Local Advisory Committee Recommendation No. 2 (copy attached as Attachment C) be followed in this respect.

CCO also submits that the Commission's Unique Site Rule, 47 C.F.R. § 73.635, will resolve much of the "problem" which the present rulemaking purports to address. The Commission should compel broadcasters to permit reasonable collocation on existing towers.

CCO further submits that the Commission's proposed rule (and in particular the preemption aspects of it) will effect a taking under the Fifth Amendment to the U.S.

Terrell, The Colony, Thompsons, Timpson, Tyler, University Park, Vernon, Victoria, Waxahachie)

Utah: City of Provo

Constitution, as it could be interpreted to require the placement of towers on municipally owned property or effect a diminution in the value of nearby private properties. Broadcasters should be required, at a minimum, to provide indemnification and compensation for any harm resulting from the preemption of local protective regulation.

The Commission's proposed rule would also preempt state and local regulation of RF regulation matters. Such preemption is totally inappropriate, however, unless the Commission is willing to fill the regulatory void and provide an alternative enforcement mechanism, which it at present does not appear prepared to do.

Finally, CCO believes that the adoption of the Commission's proposed rule, by preempting certain state and local land use regulation, could have significant adverse impact on the environment. Under such circumstances, the National Environmental Policy Act, 47 U.S.C. § 4321 et. seq. ("NEPA"), mandates the preparation of an Environmental Impact Statement during the rulemaking process.

II. STATE AND MUNICIPAL FILINGS SUPPORTED

CCO has reviewed the filings made by state and municipal commenters and interests in this proceeding, such as by the Commission's Local and State Government Advisory Committee; the City of Phoenix; Dallas, Texas and Cedar Hill, Texas; the City and County of San Francisco; the City of New York; the Commonwealth of Massachusetts; the Cape Cod Commission; County of Jefferson (Colorado); the National League of Cities and NATOA; the City of Philadelphia; and the City of Chicago, among many others. CCO believes that these submissions set forth in detail the constitutional, statutory policy and factual reasons

why the proposed rule is invalid, improper and should not be adopted. CCO supports -- but does not repeat -- the arguments made by these other state and municipal organizations.

III. BROADCASTER FILINGS VIOLATE REQUIREMENTS OF TRUTHFULNESS AND CANDOR AND SHOULD BE DISREGARDED, THE PROCEEDING TERMINATED AND OTHER APPROPRIATE ACTION TAKEN

A. Duty of Truthfulness and Candor: The Commission and the courts have repeated stressed the obligation of complete truthfulness and candor required of applicants to this Commission. Specifically, applicants are under a duty of complete candor. As stated in George E. Cameron, Jr., Communications, 91 FCC 2d 870, DA 82R-58 (1982), at ¶ 42:

> ". . . [t]he Commission must rely heavily on the completeness and accuracy of the admissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known. See, e.g., Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240, 243 (D.C. Cir.), cert. denied, 449 U.S. 834 (1980) [(When there has been a misrepresentation even on a relatively minor matter, the very fact of misrepresentation is more important than the item involved, since the Commission must proceed on the basis of absolute trust and confidence in the representations made to it by its licensees.)]; Golden Broadcasting Systems, Inc., 68 F.C.C. 2d at 1101-04.

And, where it appears that the duty of candor has not been met by an applicant, the Commission has recognized that the application should be denied, or at the very least, deferred. George E. Cameron, Jr., Communications, 91 F.C.C. 2d 870, DA 82R-58 (1982) at ¶ 43 ("There is no plausible doubt had the Commission been accurately apprised during the pendency of the [application] of the financial and organizational paroxysms then

afflicting the applicant, that -- at the very least -- grant of the [application] would have been deferred.").

This Commission, within the last month, has applied these principles to reject an application for Open Video System (OVS) certification (due to lack of candor in the applicant's submission) stating:

> ". . . Wedgewood has failed to inform the Commission fully regarding information that could be material in determining whether Wedgewood is eligible to be certified as an open video system operator. The Commission must have full confidence in the truthfulness of representations made to it by applicants for Commission authorization to provide a service or operate a facility. As the United States Court of Appeals for the District of Columbia Circuit has stated, 'the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate.' [citing RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert denied*, 456 U.S. 927 and 457 U.S. 1119 (1982).] An applicant's failure to come forward with a candid statement of relevant facts, whether or not such information is particularly elicited by the Commission, is a breach of the applicant's obligation to be truthful. [citing In re Applications of Liberty Cable Co., WT Docket No. 96-41, 11 FCC Rcd 14133, 14138-39 (1996) and In re Application of Fox Television Stations, Inc., 10 FCC Rcd 8452, 8491-92 (1995).] Wedgewood Communications Company, DA 97-2355, ___ FCC Rcd ___, Cable Services Bureau (released Nov. 7, 1997).

Broadcasting interests, in their filings with this Commission, have cited a number of alleged instances of what they contend are inappropriate actions or delays by states or local units of government regarding the siting and construction of broadcast towers. CCO is only aware of three instances in which the communities named by the broadcasting interests in

fact were made of aware of the statements about their community's actions. In 100% -- all -- of these cases, broadcasters' representations were substantially and materially inaccurate as follows:

B. San Francisco: Statements about San Francisco in NAB's Petition for Rulemaking in this matter have been directly rebutted by the City and County of San Francisco ("San Francisco"). In particular, San Francisco stated that the Petition's descriptions of events related to proposed modifications of a broadcast tower in the City were "profoundly misleading" for failure to mention (1) the public safety issues involved in the modifications to the tower, (2) other public purposes served by the City's review, (3) the fact that a number of the actions complained of by the NAB were undertaken voluntarily by the broadcaster in question, and (4) substantial misstatements about the time the City has taken on a number of matters (such as NAB failing to mention substantial delays by the broadcaster in applying for needed municipal permissions and lengthy periods of time when the broadcaster failed to provide requested information). See NAB Petition at 10-11 and the Comments of the City and County of San Francisco, passim.

C. Jefferson County, Colorado: Similarly, the NAB Petition is materially incorrect in its description of the Jefferson County, Colorado zoning ordinance. As Jefferson County pointed out in its comments, the Petition is inaccurate in noting that new towers are generally limited to 200 feet because, inter alia, (1) existing antennas may be maintained or replaced with other antennas that provide the same type of service, and (2) the 200 foot height restriction is of little consequence because the mountain itself is already 2000 feet

high, well above the urbanized target area of Denver which lies several thousand feet lower in the east.

And, as Jefferson County points out, its zoning regulations do not, as stated in the Petition, "require an applicant to make its tower available for use by other broadcasters," but instead only requires good faith negotiation and rental at a reasonable charge and, in fact, includes language inserted at the request of broadcasters stating that an owner may refuse to lease excess space if reasonable business terms cannot be agreed upon. Jefferson County Comments, at 6. Most fundamentally, the NAB Petition fails to point out that Jefferson County is attempting to minimize the number of single user towers by promoting "collocation" and multiple user towers which both serve the interests of broadcasters while minimizing the adverse impacts on the terrain and surrounding community.

D. Denton/Cedar Hill, Texas: As is set forth in the affidavit attached hereto as Attachment A, the statements by the Association of America's Public Television Stations and the Public Broadcasting Service ("PBS") are simply incorrect. PBS states that KERA/KDTN's six month option on land for a tower ran out due to a local moratorium. PBS Comments, at 6. This is not correct. See affidavit of Michael A. Bucek, First Assistant City Attorney for the City of Denton, Texas, attached to these comments as Attachment A.

Rather than construct a tower in an area the City zoned for a tower farm, or collocate on an existing tower, Mr. Bucek points out that KERA/KDTN sought to rezone a tract of land in the City for its tower. It submitted its rezoning request to Cedar Hill's Planning and Zoning Commission, which recommended that the City Council deny the request without

prejudice. Decisions whether or not to grant rezoning requests, however, are made by the City Council, not the Planning and Zoning Commission. The Planning and Zoning Commission's recommendations are not binding and, in fact, are many times rejected by the City Council. In this case, KERA/KDTN never requested that the zoning application be placed on a City Council agenda. KERA/KDTN never gave the City Council a chance to vote on the issue. The City later imposed a moratorium in response to the collapse of another tower that resulted in the death of three workers. That moratorium, however, never applied to KERA/KDTN's zoning case. See Attachment A. In short, it is a gross factual misrepresentation for PBS to assert that the expiration of its six month option was somehow caused by the City's moratorium.

The preceding are the only three instances in which CCO is aware that municipalities have been made aware of statements about them by broadcaster comments in this docket. In each and every case the statements were materially incorrect.

E. Dismissal of Petition is Required: As noted above, this Commission has repeatedly stated that applicants are under a duty of candor and when that duty is breached, the remedy is to dismiss the application. That result must occur here where it appears that the broadcasters have not been candid with the Commission in the purported facts they have submitted as a basis for the Commission to rule.

This result is warranted because if this lack of candor and material misstatement is this prevalent in the three instances CCO is aware of, where communities have been advised as to the representation/misrepresentations made about them in this proceeding, severe doubt

is cast on the factual assertions by all similar factual statements by broadcasters in this proceeding such that they now have no probative value.

IV. STATE AND LOCAL GOVERNMENT ADVISORY COMMITTEE RECOMMENDATION NUMBER 2 MUST BE FOLLOWED

As the Commission may be aware, the State and Local Government Advisory Committee, in one of its first actions, addressed the issue of misstatements and lack of accuracy in descriptions to this Commission by private parties of actions by municipalities. See State and Local Advisory Committee Recommendation No. 2 (adopted June 27, 1997) (copy attached as Attachment C).

The preceding material misstatements show that the State and Local Government Advisory Committee is correct. At a minimum, the Commission in this rulemaking proceeding should refuse to consider any factual assertions by broadcasters as to municipal action unless the broadcaster certifies in writing that the comments or document in question (1) has been served upon the clerk and chief legal officer of each community named or described in the document, together with a statement that (2) it is being submitted to the FCC in support of preemption of local zoning authority over broadcast towers, combined with (3) instructions on how to file a response with this Commission should the community so desire.

V. AN ADEQUATE REMEDY LIES IN THE UNIQUE SITE RULE AND THE COMMISSION COMPELLING BROADCASTERS TO ALLOW COLLOCATION ON THEIR TOWERS

Several broadcasters note that the Commission's Unique Site Rule, 47 CFR § 73.635, would relieve much or all of the "problem" which this rulemaking purports to address.

Briefly, the Unique Site Rule requires a broadcaster owning a tower which occupies the only site in the area which is practically available for broadcast purposes to allow the collocation of other broadcasters' antennas on its tower. Id. As WFTC-TV, Minneapolis, Minnesota set forth in its comments:

> "Broad preemption rules are not necessary to encourage deployment of digital television service in its market. Rather, WFTC urges the Commission to modify and enforce its Unique Site Rule, 47 C.F.R. § 73.635, to accomplish this objective. To make the rule more effective, the Commission should expand it to apply at all times, not just in connection with an application for license or a renewal." Comments of WFTC-TV, at 2 and passim.

WFTC goes on to cite facts clearly proving its point where broadcasters refuse to allow the collocation of competitors' antennas on their towers until pressure was applied by this Commission, such as via the Unique Site Rule. Id.

Analogous situations where the Unique Site Rule might be applied to advantage are set forth in the comments of Champlain Valley Telecasting, Inc., where competing broadcasters or members of the "Mount Mansfield Collocation Association" appear to have vetoed or at best badly delayed Champlain Valley Telecasting from putting its antenna on the common tower on Mount Mansfield. Comments of Champlain Valley Telecasting, at 3 and following.

It is surprising to CCO that this Commission has not taken the obvious step of

expanding its Unique Site Rule as suggested by WFTC-TV to apply in all places at all times.[2] Given the statements by the broadcasting interests in this proceeding as to how important it is to have quick action and the importance of digital television and other services, it would appear that this Commission could simply order licensees owning towers to allow third parties to collocate facilities on such towers without any compensation to the tower owner. This would accord with broadcaster's statements as to the importance of finding a quick solution and the lack of material impact of modifying towers. Alternatively, the Commission could, as proposed by the NAB, set up an alternative dispute resolution ("ADR") mechanism where, if a party wishes to collocate on the tower of an existing licensee and they cannot reach an agreement, then the alternative dispute resolution rules proposed by the NAB and set forth in the proposed rule at subsection (d) apply. CCO is not aware of any principled basis on which NAB members could object to being subjected to the same ADR rules which they have supported before this Commission.

VI. BROADCASTERS SHOULD PROVIDE COMPENSATION FOR HARM THEY CAUSE AND PROVIDE ADEQUATE SECURITY THEREFORE

Several commenters in this docket have noted the substantial Fifth Amendment takings problems involved with the Commission's proposed rule due to its either being interpreted as requiring a municipality to allow towers to be located on property the

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[2] The failure of the Commission to act may be due to the fact that, as suggested by several broadcasters, it is in fact competing broadcasters who oppose the zoning of new towers. "Sometimes competing broadcasters stir up the local authorities, spreading disinformation to the effect that towers will interfere with police and fire communications, stop computers from running, etc." Comments of Sima Birach, at 2.

municipality owns (City of Phoenix, at 2) or due to the diminution in value of nearby properties. See, e.g. the extensive Comments of the City of Philadelphia at 22 and following. See also Comments of San Francisco, at 14 and following.

CCO believes that this Commission lacks the authority to in any way compel such a taking because (as set forth by San Francisco, Philadelphia and others) the Commission lacks any statutory condemnation authority and also lacks the authority to expose the Federal Treasury to the resulting substantial damage claims against the Federal government which might result. If, despite the preceding, the Commission determines to proceed with any sort of preemption requirement, then this Commission must require any broadcasters taking advantage of such a rule to be responsible in damages and indemnification to both the Federal government and to any affected landholders (or other parties) for harm caused by the preemption of local regulations in question. Adopting such a requirement is fair and reasonable for several reasons.

First, it has the salutary effect of requiring the broadcasters to balance the benefits they may gain against the harm that they may cause. In economists' language, "externalities" caused by the broadcasters actions are internalized.

Second, it prevents the expansion of what former Senate Majority Leader Robert Dole has termed "corporate welfare" for broadcasters by giving them additional digital TV spectrum for free. There is no reason why the Federal Treasury should further subsidize broadcasters by also paying millions (or billions) of dollars for decreased property values caused by broadcasters building towers to use the free spectrum.

Third, this approach takes at face value the broadcasters' repeated assertions in this docket to the effect that any harm to property values (or other harms) caused by their proposed towers are minor. If the broadcasters mean this assertion they should be willing to stand by it in damages and indemnification.

Fourth, it will prevent severe criticism of and repercussions to this Commission if it goes forward and the resulting damage claims appreciably harm the ongoing effort by this Commission and Congress to balance the Federal budget.

To effectuate the preceding, the Commission should require that prior to invoking any preemption rule (such as that proposed) the broadcaster in question should agree in writing, with all appropriate documentation (agreements, financing statements, mortgages and the like), to the following general provisions: First, that the broadcaster is obligated to the Federal government, all nearby landowners and other affected parties for all harm resulting directly or indirectly from the preemptive action being requested. In particular, so-called "strict liability" concepts derived from the tort context should apply.

Second, to avoid problems similar to those encountered by this Commission in the PCS area, a broadcaster should be required to grant an appropriate mortgage and/or security interest in its assets in order to properly secure the performance of this indemnification obligation. The mortgage and security interest should cover property "used" by the broadcaster to avoid the requirement being evaded by having the assets in question leased, owned by related shell corporations or the like. These mortgages and security interests should run in favor of the Federal government, this Commission and the parties described

above.

Third, the broadcasters should agree, if any claim against it is unsatisfied for a period of more than 30 days, that a party may either realize on the collateral just described and/or that the broadcaster's license may be sold at auction.

CCO respectfully suggests that steps such as these just described are necessary to effectuate in a meaningful manner a policy of requiring broadcasters taking advantage of the Commission's proposed preemption rule to truly be responsible for any harms which they may cause.

VII. FAA HEIGHT REGULATIONS DO NOT PREVENT CONSTRUCTION OF NON-CONFORMING TOWERS

CCO wishes to correct one mis-statement in its initial comments. In these comments, CCO indicated that out of the 18,292 total airports in the United States (as of December 31, 1996) the FAA regulated tower placement for the 29% (5,389 airports) that are "public use airports." Comments of Concerned Communities and Organizations, at 8-9. CCO went on to state that the Commission should not preempt local zoning because for the other 13,000 (71%) of the airports in the United States local zoning was the only restriction on tower placement. Id., at 9-10.

In fact, it appears that CCO was incorrect in that it understated the importance of local zoning: Specifically, the many aviation interests who have filed in this docket have uniformly stated that the FAA's Obstacle Evaluation procedures in fact do not prohibit the construction of towers that do not conform with FAA rules. See, e.g. the comments of the

National Air Transportation Association ("NATA") as follows:

> "The Federal Aviation Administration (FAA) is the federal agency charged with ensuring safe and accessible air transportation in the United States. However, the FAA has no authority to prohibit the construction of structures even if those structures pose a threat to the continued safety of the traveling public. Federal Aviation Regulations require only FAA notification and completion of an Obstacle Evaluation (OE) for any proposed construction exceeding certain trigger heights above ground. It is important to recognize that regardless of the FAA's determination of hazard or no-hazard in the OE, the structure can still be built. This unique situation exists because the FAA can exercise no authority over the use of land even if a structure intrudes upon navigable airspace. It is in this area, that the continued safety of aircraft and the accessibility of an airport to aircraft can become wholly dependent upon state and local zoning ordinances. In fact, many municipalities enact zoning ordinances to prohibit exactly the type of construction at or near airports as is addressed in this NPRM." Comments of NATA, at 2.

Thus, as stated by the NATA, despite its rules, the FAA has "no authority over the use of land even if a structure intrudes upon navigable air space." That authority resides solely with units of state and local government. The need for state and local zoning is thus present for all 18,292 airports in the U.S., not just the 13,000 that are private use airports.

VIII. THE COMMISSION MAY NOT PREEMPT STATE AND LOCAL GOVERNMENTS ON RF RADIATION MATTERS UNLESS IT PROVIDES AN EFFECTIVE ENFORCEMENT MECHANISM

The Commission's proposed preemption of state and local governments on RF radiation matters is constitutionally infirm for a very simple reason. As a matter of constitutional law, the Federal government (including the Commission) may not regulate in areas reserved to the states, and to the limited extent it may preempt state and local action it

may do so only if and to the extent it provides an effective regulatory substitute. In other words, even where the Commission may preempt state and local action it may not simply preempt and then refuse to act, thereby creating a "regulatory vacuum" which is harmful to the public interest.

A. Interference with Public Safety Communications: The provision of police, fire and emergency services are an essential attribute of the state and local government. Law enforcement in the United States is overwhelmingly provided at the state and local level. It is one of the principal functions associated even with a limited or "night watchman" role of government. Correspondingly, there has been substantial resistance to creation of any kind of Federal police force.

Fire and emergency services are exclusively provided at the state and local level. There is no Federal fire or EMS equivalent to the FBI.

The Tenth Amendment to the Constitution provides that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X. The U.S. Supreme Court has expressly ruled that core state functions are reserved to the states and not conferred on the Federal government:

> "If the power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the states; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power of the Constitution as not conferred on Congress." New York v. U.S., 505 U.S. 144, 112 S.Ct. 2408, 2417, 120 L.Ed.2d 120 (1992).

The preceding constitutional principles apply here because broadcasters frequently interfere with local public safety (police, fire, emergency medical service) communications. Yet the FCC rarely, if ever, acts on such matters.

One example out of many such interferences is set forth in an affidavit from John L. Stoffel, Jr., Assistant City Attorney for the City of Denver, attached as Attachment B. It describes an extremely serious situation where essentially all police, fire and emergency communications for the City and County of Denver (and for other government institutions in the area, including civil air patrol) were disrupted by a local broadcaster. To put it directly, this Commission refused to become involved in any way. Fortunately the City was able to secure (via local court action) appropriate relief due to the restrictions (to the effect that no interference with City communications would be allowed) placed years ago in the documents whereby it leased space on the tower.

The City and County of Denver advise that the Commission's radio frequency interference standards are such that even if they are complied with, public safety communications can be seriously disrupted. What this Commission has to be aware of is that a municipality cannot and should not tolerate interference with emergency communications, which can include "officer in distress" call, communications with fire trucks, dispatching EMS units to heart attack victims, or similar critical communications.

This Commission has historically been somewhat reticent in the enforcement of its radio frequency rules. If anything, the relative lack of action by the Commission appears to have increased due to the Commission's having closed many of its field offices to cut costs.

Illustrations of this are shown by the following:

1. A front page article in *The Wall Street Journal* from October of this year describing just one out of hundreds of "pirate" radio stations in the U.S. The article describes how the FCC is well aware of the illegal operation in Tampa but has not shut it down. Pirate radio station 102.1 FM apparently continues to operate in the Tampa, Florida area to this day along with hundreds of its ilk nationwide. Orwall, Bruce, *Illegal Broadcaster Has Taunted Government for 2 Years; FCC Man: "I'll Nail Him"*, WALL ST. J., Oct. 21, 1997, at A1. When the Commission allows literally hundreds of pirate broadcasters to operate there is no expectation that the Commission will deal with more subtle and difficult issues of broadcaster interference with public safety communications.

2. In Grand Rapids, Michigan the conviction of a person for interfering with police communications (e.g. jamming repeated descriptions of a bank robber) was prosecuted under local law in part due to the absence of any effective FCC enforcement. Kolker, Ken, *Electronic sleuth tracks down police radio jammer. Grand Rapids cops have had to deal with at least 35 blocked radio transmissions over past two years,* G.R. PRESS, Mar. 3, 1997, at A1, *Suspect faces trial for giving cops static,* G.R. PRESS, Nov. 15, 1997, at A3.

3. The comments submitted by Mark Hutchins in this docket which describe repeated license violations by radio station WIZN, including exceeding RF radiation requirements, such that the general public traversing the area can easily be exposed to radiation in excess of the Commission's guidelines, along with other violations.

There is factually no question that neither this Commission nor state and local governments can tolerate radio frequency interference which places the lives of public safety officers or the health, life or property of residents in danger. This Commission should therefore under the Tenth Amendment exempt from its radio frequency interference rule any interference by broadcasters (or others) with state and local government public safety communications. Alternatively, if the Commission believes that it must retain some role in this area it should do so and recognize that immediate resolution of these problems is often

essential. Any such rules should thus provide that the effected state or local government should apply first to the FCC and that if this Commission does not resolve the matter within a reasonable period of time the state and local government is free to act. Given the stakes involved, a reasonable period of time could be as short as one day for interference with critical police, public safety or emergency functions, or up to a couple of weeks for situations where the interference is less serious or the functions less critical. If the problem is not resolved within such timeframes, the state and local government (and state and local courts) should be free to act as appropriate.

IX. AN ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

CCO has already alerted the Commission to the requirements of the National Environmental Policy Act, 42 U.S.C. §4321, *et seq.* ("NEPA"). See Comments of Concerned Communities and Organizations, at 24-29. As indicated in those comments, NEPA requires the Commission and all other federal agencies to conduct an Environmental Impact Statement ("EIS") for all major federal actions affecting the environment. 42 U.S.C. §4332. That requirement effectively supersedes any other Commission rules which may be inconsistent with it. 47 C.F.R. §1.1303. The environmental impact of broadcast towers was discussed extensively in those original comments. It was pointed out that broadcasters often seek to place towers in environmentally sensitive areas such as wetlands, on mountains or alpine environments, or in parks or similar wilderness areas. The necessity for an EIS was clearly demonstrated.

The comments filed by other interested parties in this proceeding not only confirm, but underscore the requirement that the Commission's proposed rule requires an environmental analysis. The State of Vermont Environmental Board, for example, extensively described the environmental concerns associated with the placement of broadcast facilities atop Mount Mansfield. See Comments of the State of Vermont Environmental Board, at 16-23. Those comments describe the purposes and policies behind Vermont's Act 250, which contains carefully prescribed procedures designed to minimize any adverse impact on the environment, and which would be effectively preempted by the Commission's proposed rule. Similar concerns were expressed by the Hardwick Action Committee with respect to the environmental impact on Buffalo Mountain, also in Vermont. See Comments from the Hardwick Action Committee. Those comments identified the "myriad of wild creatures" living in the general vicinity of a proposed cellular phone tower (e.g., black bears, grouse, deer, flying squirrels, wild turkeys, moose, porcupines, etc.), and predicting that the construction of the tower on the mountain (along with accompanying parking lot, trailer and half mile long road) "would destroy wild life habitat." Id., at 4.

Significant environmental concerns were also expressed by the Adirondack Park Agency with respect to New York's Adirondack Park, a 6,000,000 acre area in northern New York. The comments describe the area as "the largest designated Wilderness area east of the Mississippi River." Comments of the Adirondac Park Agency, at 1. The Agency's comments quote the "century old provisions" in the New York State constitution reflecting that state's public policy regarding the environmental preservation of wilderness lands of this

nature. Id. The Commission's proposed rule would preempt not only this longstanding constitutional mandate, but also New York State statutes which would otherwise protect the park lands with respect to broadcast transmission facilities. The comments of the New York Department of State reflect similar concerns in connection with the preemption of the New York Environmental Quality Review Act, the state counterpart of NEPA. See Comments of the Department of State, State of New York.

Also illustrative of the environmental impact of the proposed rule are the comments of the Pinelands Commission of the State of New Jersey. Those comments discuss the Congressional designation of a large tract of land within the state as The Pinelands National Reserve, as well as the important national interests behind that designation. The statutory designation mandates the adoption of a Comprehensive Management Plan ("CMP") which, among other things, requires an assessment of the "scenic, aesthetic, cultural, open space, and outdoor recreation resources of the area together with a determination of overall policies required to maintain and enhance those resources." Comments of The Pinelands Commission, at 1. As a result of that assessment, the CMP limits the height of structures (including radio and television transmission facilities) in certain areas of the Reserve "where future growth is severely restricted." Id. at 2. The comments express extreme concern over the preemption of this rule and other CMP restrictions of that nature.

The environmental impact of the Commission's proposed rule is exacerbated by the fact that it would include not only the towers, but also any "associated buildings." The City of Suffolk, Virginia, for example, noted that digital television towers "would undoubtedly